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"Medicate-To-Execute": The Dilemma of Involuntary Medication and Mentally Ill Death Row Inmates

Paige Ayres
payres1@vols.utk.edu

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“MEDICATE-TO-EXECUTE”: THE DILEMMA OF INVOLUNTARY MEDICATION AND MENTALLY ILL DEATH ROW INMATES

PAIGE M. AYRES *

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I. INTRODUCTION

On October 4, 1989, Steven Staley walked into a Steak and Ale Restaurant in Tarrant County, Texas for dinner with his two friends Tracey Duke and Brenda Rayburn.¹ After dinner and just prior to closing, Staley and Duke removed two semi-automatic pistols, gathered the employees of the restaurant, and demanded that the manager Robert Read open the cash register.² Read then offered to serve as a hostage to Staley if he would promise to leave the other employees alone.³ Staley agreed, and as the police waited outside the restaurant, Staley, Duke and Rayburn exited the restaurant using Read as a human shield against the police.⁴

Once outside the restaurant, Staley, Duke and Rayburn stole a car from the parking lot and shoved Read into the back of it.⁵ As the criminals sped away with Read as hostage, police raced after them and a high-speed car chase followed.⁶ The chase ended when the stolen car broke down, and

* J.D. Candidate, May 2015, The University of Tennessee College of Law; B.S. Psychology, 2012, Virginia Tech.

¹ THE INTERNATIONAL JUSTICE PROJECT, <http://www.internationaljusticeproject.org/illnessSstaley.cfm> (last visited Dec. 3, 2013).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

police found a murdered Read inside the car.⁷ Evidence later indicated that Read was shot in the head by both Staley and Duke.⁸

A month earlier, Steven Staley had escaped from a correctional center in Denver, Colorado.⁹ Following the escape, Staley had gone on a rampage of nine armed robberies as he moved from Colorado to Texas with his last robbery being the one in Tarrant County.¹⁰ In April of 1991, Staley was convicted of capital murder and sentenced to the death penalty.¹¹ After the trial court sentenced Staley to death, Staley exhausted his appeals options and was also denied relief on two applications for a writ of habeas corpus.¹² Staley would be executed in February of 2006.¹³

1. *Tortured Life*

One month before Steven Staley's scheduled execution in 2006, he filed a motion with the trial court challenging his competency to be executed.¹⁴ Based on this challenge, the trial court ordered a psychiatric evaluation of Staley.¹⁵ Dr. Randall Price and Dr. Mark Cunningham were two of Staley's evaluating psychiatrists.¹⁶ Both doctors explained that Staley suffered from a severe form of paranoid schizophrenia that had been routinely diagnosed in the patient for over fifteen years, and that his disease had increasingly deteriorated over time.¹⁷ The doctors stated that Staley had been prescribed anti-psychotic medications since 1993 in an effort to control his schizophrenia symptoms, but that Staley had not consistently complied with his prescription.¹⁸

Although the origin of schizophrenia has yet to be identified, scientists know there is a strong genetic link and predisposition for the disease because it often runs in families.¹⁹ Steven Staley's family most definitely suffered from mental illness. Staley's mother experienced severe mental illness during her lifetime. She was admitted to psychiatric hospitals on numerous occasions and was treated with psychiatric medications.²⁰ Staley was abused by his mother from an early age, and often exposed to

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Staley v. State*, 2013 WL 4829128, at *1 (Tex. Crim. App. Sept. 11, 2013).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ AMERICAN PSYCHIATRIC ASSOCIATION, <http://www.psychiatry.org/schizophrenia> (last visited Nov. 30, 2013).

²⁰ THE INTERNATIONAL JUSTICE PROJECT, *supra* note 1.

extremely violent behaviors.²¹ When he was six or seven years old, Staley's mother tried to pound a wooden stake through his chest; at a later date, she attempted to stab both Staley and his sister with a butcher's knife.²² Staley's father was a severe alcoholic who was later killed in a traffic accident in 1985. Staley's maternal grandfather committed suicide, and Staley himself also attempted to commit suicide when he was 16 or 17.²³

After being incarcerated and on death row, Staley was hospitalized for psychiatric care ten times in total. Over the years, his behavior slowly deteriorated as he exhibited "psychotic, bizarre and, on occasions, hostile behavior . . . [as well as] hallucinations, paralysis and . . . delusional thinking."²⁴ During his incarceration, Staley also suffered from depression, and suicide precautions had to be taken.²⁵

Dr. Cunningham, one of the evaluating clinical and forensic psychologists, explained that Staley's symptoms included "self inflicted injuries, grossly neglected personal hygiene, resting in his own excrement and urine, irregular eating and sleeping habits, including refusing food and fluids, delusions of paralysis, and lying on one spot in his cell so long as to rub a bald spot in the back of his head."²⁶ He explained that Staley had a history of refusing his medication and that long-term stabilization would require Staley to be involuntarily medicated.²⁷ Dr. Price, another evaluating doctor, explained that Staley had frequently refused his medication because he denied he had an illness and believed "the medication was an attempt to 'poison' him."²⁸

Following a series of these psychiatric evaluations for Staley's first competency hearing, the trial court ruled that Staley was incompetent to be executed. However, shortly after this ruling, the State filed a motion with the trial court requesting that Staley be involuntarily medicated in order to comply with his anti-psychotic medications.²⁹ The State cited two interests in forcing Staley to be involuntarily medicated: a medical interest to control the symptoms of his psychosis and ease his suffering, and a State interest in enforcing his judgment of execution.³⁰ Staley disputed both of these interests and argued that psychotropic drugs can yield harmful side effects that challenge the medical purpose and that "artificial competence" achieved by medication does not constitute the standard for competency to

²¹ Emily Bazelon, *Texas Wants To Drug a Prisoner So They Can Kill Him*, SLATE (May 11, 2012), http://www.slate.com/articles/news_and_politics/crime/2012/05/the_execution_of_steven_staley_forcible_medication_on_death_row_in_texas.html.

²² THE INTERNATIONAL JUSTICE PROJECT, *supra* note 1.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Staley v. State*, 2013 WL 4829128, at *2 (Tex. Crim. App. Sept. 11, 2013).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

be executed under the federal Constitution or the Texas Constitution.³¹ The dilemma that Staley faced was one that other mentally ill death row prisoners had faced. Without drugs, Staley risked facing horrible psychotic symptoms that were somewhat lessened by taking medications. However, with drugs, and as the current law defines, Staley was arguably sane enough for execution.³²

II. MENTAL ILLNESS IN PRISON

Mental illness and the prison system have long been closely related. In 2000, the American Psychiatric Association estimated that twenty percent of prisoners suffered from a serious mental illness, and up to five percent of those prisoners suffered from symptoms of active psychosis at any given time.³³ In 2004, a study conducted by the Human Rights Watch concluded that out of the 2.1 million Americans in jails and prisons, as many as one in five prisoners are seriously mentally ill, while there are only about 80,000 patients residing in mental hospitals in America.³⁴ As the country's prison system has quadrupled over the past 30 years and more state hospitals have been closed, jails and prisons in America "have become the nation's default mental health system," far outnumbering the number of mentally ill people who are in mental hospitals.³⁵ Jamie Fellner, one of the authors of the 2004 Human Rights Watch study, says that she found "enormous, unusual agreement among police, prison officials, judges, prosecutors and human rights lawyers that something has gone painfully awry with the criminal justice system" since jails and prisons now house more mentally ill persons than mental hospitals in America.³⁶

The Human Rights Watch study found that a life in prison only compounds the problems of the mentally ill who may have trouble following regimented prison rules or who may struggle with a life of solitary confinement.³⁷ Solitary confinement can be particularly difficult for mentally ill inmates because the isolation is often psychologically destructive. This is especially true concerning death row inmates whose solitary confinement is commonly coupled with the psychological pressure of awaiting one's execution date. University of Tennessee Professor Dwight Aarons, whose particular area of scholarly interest is the death penalty, explains the conditions of solitary confinement for a death row prisoner:

³¹ *Id.*

³² *See* *Washington v. Harper*, 494 U.S. 210 (1990).

³³ Fox Butterfield, *Study Finds Hundred of Thousands of Inmates Mentally Ill*, N.Y. TIMES (Oct. 22, 2003), <http://www.nytimes.com/2003/10/22/national/22MENT.html>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

We probably don't fully appreciate getting up in the morning and having something to do. In prison, you just sit there with no TV, no radio, just the walls, the concrete, a bed, maybe a shower and a toilet. And that's it . . . there are only so many hours you can sleep, only so many letters you want to write, and you have a limited number of books. And so it's a terrific incentive to get out of your prison room, but there are still some that won't behave, so they're kept in their cell for 23 hours a day. And that anger and those mental health issues slowly continue to deteriorate because they're not being let out . . . they're angry, they're isolated, they have a bad diet . . . you can almost anticipate mental health issues.³⁸

As Professor Aarons explains, the harsh conditions of solitary confinement make it extremely difficult to avoid mental illness in prison. Add to that the unique psychological pressures a death row inmate encounters waiting for his execution, and it is understandable that a high percentage of death row inmates suffer from severe mental illness. Researchers calculate that approximately 40 to 70 percent of death row inmates are psychotic.³⁹ As one death row inmate wrote about life and psychosis on death row, "Prison is a place where grown men have gone insane. It is a place where men have been killed and where some have even killed themselves. Prison is hell."⁴⁰

III. INSANITY AND DEATH ROW

Despite overwhelming evidence regarding the prevalence of mental illness in the prison system, especially mental illness in death row prisoners, the legal system does not recognize mental illness as a ban on execution. However, the legal system does recognize insanity as a ban on executing a prisoner.

The ban on executing a prisoner who has lost his sanity dates back to the English common law where the practice was considered "savage and inhuman."⁴¹ Sir Edward Coke expressed concerns about humanitarianism and about society losing the deterrent value of the death penalty in England

³⁸ Interview with Dwight Aarons, Professor of Criminal Law, University of Tennessee Law School, in Knoxville, Tenn. (Nov. 11, 2013).

³⁹ Julie D. Cantor, M.D., *Of Pills and Needles: Involuntarily Medicating the Psychotic Inmate when Execution Looms*, 2 IND. HEALTH L. REV. 119, 136 (2005).

⁴⁰ Greg Lefevre, *Death Row Inmate Nominated for Nobel Peace Prize*, CNN.com (Dec. 4, 2000) <http://edition.cnn.com/2000/US/12/02/death.row.nobel/>.

⁴¹ *Ford v. Wainwright*, 477 U.S. 399, 406 (1986).

if the State put the insane to death.⁴² Coke was concerned because killing an insane man “can be no example to others.”⁴³ Other explanations for the common law ban on executing the insane are that it “simply offends humanity,”⁴⁴ that madness is its own punishment,⁴⁵ and that the community’s pursuit for retribution is not served by executing an insane person “who has no comprehension of why he has been singled out and stripped of his fundamental right to life.”⁴⁶ Despite differing reasons, the United States Supreme Court made it clear in *Ford v. Wainwright* that “no State in the Union permits the execution of the insane.”⁴⁷ But it was not until the Court’s decision in *Ford* that an actual constitutional limit on executing insane prisoners was imposed.⁴⁸

In *Ford*, the Court held that the Eight Amendment’s ban on cruel and unusual punishment prevented the State from executing a prisoner who was insane.⁴⁹ In reaching its decision, the majority noted that there was no single rationale for the ban, but rather, it explained: “[w]hether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eight Amendment.”⁵⁰

The majority further explained that its decision “explicitly recognized in our law a principle that has long resided there.”⁵¹ And while the majority made clear its position on the issue, it was Justice Powell’s concurring opinion that laid out an actual test for appropriately defining the type of mental deficiency that would trigger the Eight Amendment’s prohibition. Justice Powell stated that, “the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.”⁵² Justice Powell’s test, focusing on a death row prisoner’s understanding of the nature and purpose of the punishment he is to receive, is the legacy from *Ford*. However, the Court’s decision still left a lot of questions to be answered regarding the standard of determining mental insanity.

It was not until its 2007 decision in *Panetti v. Quarterman* that the United States Supreme Court again addressed the issue of a prisoner’s competency to be executed.⁵³ In 1992, Scott Louis Panetti shot and killed

⁴² *Id.* at 407.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 408.

⁴⁶ *Id.* at 409.

⁴⁷ *Id.* at 408.

⁴⁸ *Id.* at 410.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 417.

⁵² *Id.* at 422. (Powell, J., concurring).

⁵³ *Panetti v. Quarterman*, 551 U.S. 930 (2007).

his wife's mother and father.⁵⁴ Three years later, he was tried for capital murder and sought to represent himself.⁵⁵ Despite a history of psychiatric hospitalization and a court evaluation that indicated Panetti suffered from mental illness and was prescribed substantial anti-psychotic drugs, Panetti was found competent to be tried and to waive counsel.⁵⁶ In representing himself at trial, Panetti argued he was not guilty by reason of insanity and exhibited behavior that was later described as "'bizarre,' 'scary,' and 'trance-like.'"⁵⁷ The Texas jury found Panetti guilty of capital murder and sentenced him to death.⁵⁸ After his execution date was set, Panetti made an argument for the first time that he was not competent to be executed.⁵⁹ Panetti argued that he suffered from a severe mental illness and gross delusions that prevented him from comprehending the meaning and purpose of the death penalty.⁶⁰ However, the lower courts rejected his claim of incompetency.⁶¹

On certiorari to the United States Supreme Court, the Court first stated that Panetti had "made a substantial showing of incompetency," and that once a prisoner had done so, "the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." The Court then took the opportunity to further clarify its holding from *Ford* regarding the meaning of competency to be executed. The Court held that "[a] prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it."⁶² The Court explained that, in order for the death penalty to serve a proper purpose, the defendant must understand the link between his crime and the execution. Therefore, if a prisoner's mental illness is so severe that he does not have a rational understanding of the reason for his execution, he is deemed incompetent under the *Ford* standard and cannot be executed.

IV. INVOLUNTARY MEDICATION

As previously mentioned, an overwhelming number of prisoners in the United States suffer from mental illness. Therefore, a significant amount of mental illness is treated within prison walls. But what happens when a prisoner does not want to be treated for his mental illness? There are certain constitutional protections for an inmate who wants to avoid unwanted

⁵⁴ *Id.* at 935.

⁵⁵ *Id.* at 936.

⁵⁶ *Id.* at 936.

⁵⁷ *Id.*

⁵⁸ *Id.* at 937.

⁵⁹ *Id.* at 938.

⁶⁰ *Id.*

⁶¹ *Id.* at 942.

⁶² *Id.* at 959.

medication, but those protections are not absolute.⁶³ In *Washington v. Harper*, the United States Supreme Court held that, “given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate’s medical interest.”⁶⁴

Walter Harper was sentenced to prison in Washington in 1976 for robbery, and for the next four years, he spent most of his time in the prison’s mental health unit where he consented to being administered antipsychotic drugs.⁶⁵ Harper was briefly paroled from prison in 1980, but was forced to return the next year when he assaulted two nurses at a hospital.⁶⁶ Upon returning to prison, Harper refused to take his prescribed antipsychotic drugs.⁶⁷ Harper’s treating physician sought to medicate him against his will pursuant to a Washington policy that read: “[an] inmate may be subjected to involuntary treatment . . . only if he (1) suffers from a ‘mental disorder’ and (2) is ‘gravely disabled’ or poses a ‘likelihood of serious harm’ to himself, others, or their property.”⁶⁸ However, the Washington Supreme Court reversed and remanded the case to the trial court, reasoning that Harper had a liberty interest in refusing these antipsychotic medications, and that greater procedural protections—such as clear and convincing evidence that medications were both necessary and effective for furthering a compelling state interest—were needed when “highly intrusive” antipsychotic medications were being administered.⁶⁹

The United States Supreme Court granted certiorari and reversed the Washington Supreme Court’s holding.⁷⁰ The Court found that the state’s obligation to provide adequate medical care for its prisoners and its interest in decreasing danger and disorder in the prison system were sufficient reasons to justify medicating a prisoner against his will.⁷¹ Thus, in order to forcibly medicate an inmate, the *Harper* standard requires a finding of an inmate’s danger to himself or others and a finding that the medication is in the inmate’s medical interest. In the medical arena, this decision means that a physician can only forcibly medicate an inmate who is in need of treatment if that inmate meets the test for dangerousness.⁷² A physician may not medicate an inmate who is simply disabled or incompetent to make healthcare decisions if he or she is not dangerous.⁷³ This restriction in the

⁶³ Cantor, *supra* note 39, at 133 n.113.

⁶⁴ *Washington v. Harper*, 494 U.S. 210, 227 (1990).

⁶⁵ *Id.* at 213.

⁶⁶ *Id.* at 214.

⁶⁷ *Id.*

⁶⁸ *Id.* at 215.

⁶⁹ *Id.* at 218.

⁷⁰ *Id.*

⁷¹ *Id.* at 225.

⁷² Cantor, *supra* note 39, at 134.

⁷³ *Id.*

criminal prison system gives the inmate somewhat more individual liberty than he or she would have in the civil setting.⁷⁴

Justice Stevens authored a dissenting opinion in *Harper* in which he attacked the majority's definition of Harper's liberty interest and what procedures were needed to protect that interest.⁷⁵ According to Justice Stevens, Harper had a fundamental right to refuse anti-psychotic drugs that could have serious and permanent side effects, and that could interfere with free thought, speech, emotions and beliefs.⁷⁶ Stevens explained that, "when the purpose or effect of forced drugging is to alter the will and the mind of the subject, it constitutes a deprivation of liberty in the most literal and fundamental sense."⁷⁷ Justice Stevens also attacked the majority's rationale that providing drugs was in the best medical interest of Harper, and therefore was a legitimate state interest that justified the deprivation of Harper's liberty interest. Justice Stevens argued that the policy used did not even require a finding that the drugs would benefit the inmate's medical condition.⁷⁸ Rather, Justice Stevens maintained that the only state interests served in forced medication were administrative and institutional interests like ensuring prison security.⁷⁹ For these reasons, Justice Stevens asserted: "I continue to believe that 'even the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore.'"⁸⁰

V. INVOLUNTARY MEDICATION AND DEATH ROW PRISONERS

In both *Ford* and *Panetti*, the United States Supreme Court outlined the required standard for an inmate to be considered incompetent and unable to be executed due to his mental illness. Additionally, in *Harper*, the Court discussed when it is constitutionally permissible to forcibly medicate an inmate against his wishes. However, the United States Supreme Court has yet to address whether a state may forcibly medicate a death row inmate if the purpose is to make him competent to be executed. Several lower courts have grappled with this controversial issue.

In *State v. Perry*, the Supreme Court of Louisiana was asked to address whether the State of Louisiana could involuntarily medicate death row inmate Michael Perry for the sole purpose of making him competent to be executed.⁸¹ In 1983, Perry murdered his mother, father, nephew and two

⁷⁴ *Id.*

⁷⁵ *Harper*, at 494 U.S. at 237 (Stevens, J., dissenting).

⁷⁶ *Id.* at 241 (Stevens, J., dissenting).

⁷⁷ *Id.* at 238 (Stevens, J., dissenting).

⁷⁸ *Id.* at 249 (Stevens, J., dissenting).

⁷⁹ *Id.* (Stevens, J., dissenting).

⁸⁰ *Id.* at 258 (Stevens, J., dissenting) (quoting *Meachum v. Fano*, 427 U.S. 215, 233 (1976) (dissenting opinion)).

⁸¹ *State v. Perry*, 610 So.2d 746, 747 (La. 1992).

cousins.⁸² He was 28 at the time, and had a history of mental illness dating back to the age of 16 when he was diagnosed with schizophrenia.⁸³ After being in a state mental facility for two years, Perry was permitted by the court—but contrary to the advice of his counsel—to be competent to stand trial and withdraw his insanity plea to instead plead not guilty.⁸⁴

In 1985, Perry was sentenced to death on five counts of murder.⁸⁵ However, Perry's competence to be executed soon became an issue, and court-ordered psychiatric evaluations revealed that Perry was competent for execution only while he was under the influence of the antipsychotic drug Haldol.⁸⁶ The trial court ruled that Perry was insane but able to understand the link between his crime and punishment while taking antipsychotic drugs, and thus, the court could forcibly medicate Perry.⁸⁷ However, on appeal, the Louisiana Supreme Court reversed this decision and held that forcibly medicating Perry violated his rights under the Louisiana Constitution because it violated his "right to privacy or personhood," "would constitute cruel, excessive and unusual punishment," and "fail[ed] to measurably contribute to the social goals of capital punishment."⁸⁸

In reaching its decision the court noted that the United States Supreme Court's decision in *Harper* strongly implied that the involuntary medication of a prisoner was not allowed for the purpose of punishment, and was only appropriate when administering medical treatment in the inmate's best medical interest. The Louisiana Supreme Court ruled that Perry's case was not acceptable under the *Harper* standard because "forcible administration of drugs to implement execution is not medically appropriate."⁸⁹ The court found that the State had failed to prove that medicating Perry furthered "both the best medical interest of the prisoner and the state's own interest in prison safety."⁹⁰ Thus, with no compelling state interest, the State's "medicate-to-execute" scheme was unconstitutional and must be set aside.⁹¹ The court further noted that "[n]o insane offender has been executed in the civilized world for centuries," and that the state's plan was arbitrary in how it was conceived and how it was applied to offenders.⁹² After *Perry*, Louisiana's rule is that a death row inmate is not competent to be executed unless he can achieve competence on his own without the use of medication.⁹³

⁸² *Id.* at 748.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 747.

⁸⁸ *Id.*

⁸⁹ *Id.* at 754.

⁹⁰ *Id.* at 751.

⁹¹ *Id.* at 755.

⁹² *Id.* at 766.

⁹³ Cantor, *supra* note 39, at 138.

In 2003 in *Singleton v. Norris*, another court—the Eight Circuit Court of Appeals—addressed the issue of whether death row inmate Charles Singleton could be forcibly medicated to be competent for execution.⁹⁴ Singleton was sentenced to the death penalty in Arkansas in 1979 for the murder of a 62-year-old convenience store worker.⁹⁵ At the time of the crime and during his trial, there was no sign that Singleton suffered from a severe mental illness that would qualify him as incompetent to be executed.⁹⁶ But by 1987, Singleton’s mental functioning had deteriorated and he exhibited severe signs of mental illness.⁹⁷ He lost a considerable amount of weight and, among other things, believed that his cell phone was possessed by demons and that a prison doctor had planted a device in his right ear to steal his thoughts from him when he read the Bible.⁹⁸ Singleton was diagnosed with paranoid schizophrenia and initially began voluntarily taking antipsychotic medication to control his symptoms.⁹⁹ However, Singleton would sometimes refuse to take his medications and would lapse into a psychosis.¹⁰⁰

After a medication review panel in 1997, Singleton was deemed a danger to himself and others, and was placed under a *Harper* involuntary medication order.¹⁰¹ This medication relieved Singleton’s symptoms for a short time, but “by February of 1999 he was again withdrawn and exhibited a strange speech pattern.”¹⁰² The prison responded by twice increasing the dose of his medication, but one evaluating doctor questioned whether Singleton might be psychotic even while on his medication.¹⁰³ Nevertheless, Singleton was in a difficult dilemma: while the medications reduced his overall symptoms and helped calm his hallucinations, they also rendered him sane enough for execution.¹⁰⁴ As Singleton succinctly put it, “Am I too sane to live, or too insane to die?”¹⁰⁵ This was the question the Eighth Circuit Court of Appeals was asked to address.

Singleton argued to the court that the involuntary medication order that may have been legal under *Harper* during his stay of execution became illegal once his execution date was set. He reasoned that because the medication rendered him competent enough to be executed, it was no longer in his “best medical interest,” and, therefore, the forced medication

⁹⁴ *Singleton v. Norris*, 319 F.3d 1018 (8th Cir. 2003).

⁹⁵ *Id.* at 1020.

⁹⁶ *Id.* at 1021.

⁹⁷ *Id.* at 1030 (Heaney, J., dissenting).

⁹⁸ *Id.* at 1031 (Heaney, J., dissenting).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1021.

¹⁰² *Id.* at 1031 (Heaney, J., dissenting).

¹⁰³ *Id.* at 1032 (Heaney, J., dissenting).

¹⁰⁴ Cantor, *supra* note 39, at 124.

¹⁰⁵ *Id.*

order failed the two-prong *Harper* analysis.¹⁰⁶ In a close six-to-five decision, the Eighth Circuit Court of Appeals did not agree with Singleton's reasoning. The court held that the government had an essential interest in carrying out a lawfully imposed death sentence, and that treatment with antipsychotic drugs was necessary to alleviate the symptoms of Singleton's psychosis because there was no less intrusive medical treatment to ensure his competence.¹⁰⁷ As to violating Singleton's "best medical interest," the court reasoned that, "the best medical interest of the prisoner must be determined without regard to whether there is a pending date of execution . . . [and] the mandatory medication regime . . . does not become unconstitutional under *Harper* when an execution date is set."¹⁰⁸ Thus, the majority held that the state of Arkansas could execute a death row prisoner whose competence was achieved through involuntarily medication under *Harper* even when that inmate was scheduled for execution.

The dissent in *Singleton* strongly disagreed that a medicated Singleton was competent enough for execution.¹⁰⁹ Justice Heaney expressed the dissent's opposition by stating, "I believe that to execute a man who is severely deranged without treatment, and arguably incompetent when treated, is the pinnacle of what Justice Marshall called 'the barbarity of exacting mindless vengeance.'"¹¹⁰ Justice Heaney explained his reasoning for opposing the involuntary medication of Charles Singleton. First, he argued that receiving antipsychotic drug treatment is not the same as being cured.¹¹¹ Justice Heaney explained: "when antipsychotic medication results in an improved mental state, the patient is merely displaying what has been termed 'artificial' or 'synthetic' sanity," and that drug-induced sanity is "temporary and unpredictable."¹¹² He argued that Singleton was the perfect example of the unpredictability of drug-induced sanity: his medication type and dosage were constantly in flux as was his psychological stability.

Next, Justice Heaney argued that the Government's actual interest in exacting Singleton's punishment undermined its supposed interest in medically treating Singleton. Justice Heaney remained skeptical that forced medical treatment was in Singleton's best medical interest when it would ultimately aid in his execution. He asserted that the forcible injection of anti-psychotic medications into a person's body interferes with that person's liberty, and that these drugs "can have serious, even fatal, side effects."¹¹³ Justice Heaney further asserted that once Singleton's execution

¹⁰⁶ *Singleton*, 319 F.3d at 1023.

¹⁰⁷ *Id.* at 1025.

¹⁰⁸ *Id.* at 1026.

¹⁰⁹ *Id.* at 1030 (Heaney, J., dissenting).

¹¹⁰ *Id.* (Heaney, J., dissenting).

¹¹¹ *Id.* at 1034 (Heaney, J., dissenting). (citing *Ford v. Wainwright*, 477 U.S. 399, 406 (1986), in which Justice Powell stated in his concurrence that if the insane inmate becomes "cured of his disease, the State is [then] free to execute him.").

¹¹² *Id.* (Heaney, J., dissenting).

¹¹³ *Id.* at 1035 (Heaney, J., dissenting) (quoting *Harper*, 494 U.S. at 229).

date was set, any justification for medicating him under *Harper* disappeared, and that setting the execution date itself seriously called into question the State's supposed motivation for administering drugs in the first place.¹¹⁴ Finally, Justice Heaney argued that the majority's holding in *Singleton* would result in an ethical predicament for treating physicians who are bound to act in the best interest of their patients.¹¹⁵ Not treating a mentally insane prisoner could "condemn him to a world . . . filled with disturbing delusions and hallucinations," but if a physician did choose to treat a mentally ill inmate, it could provide enough short-term relief or "artificial" sanity to result in his execution.¹¹⁶

Despite Justice Heaney's dissent and the strong controversy surrounding Singleton's execution, in January of 2004, the State of Arkansas executed Charles Singleton after twenty-five years on death row.¹¹⁷ Singleton's attorney Jeffrey Rosenzweig described the execution as "a shameful mark on the state of Arkansas, because we're talking about the execution of someone who was clearly mentally ill."¹¹⁸

VI. A RETURN TO *STALEY*

In the 2013 case of *State v. Staley*, the State of Texas was asked to address the involuntary medication issue that *Perry*, *Singleton*, and various other lower courts have grappled with.¹¹⁹ Was death row inmate Steven Staley competent to be executed when his competence was only attained by a *Harper* order of involuntary medication?¹²⁰ On appeal, the Texas Court of Criminal Appeals answered that he was not.¹²¹ The court reversed the trial court's holding, stating that the trial court lacked the authority to order the involuntary medication of Staley.¹²² Therefore, Staley could not be medicated to restore his competency for execution, and his competency finding had to be reversed.¹²³

In making its decision, the court focused solely on whether the trial court had the authority to order the involuntary medication of Staley, and failed to address whether forcibly medicating an inmate for the purpose of execution violates the Constitution.¹²⁴ A lower court once again danced

¹¹⁴ *Id.* at 1036.

¹¹⁵ *Id.* (Heaney, J., dissenting).

¹¹⁶ *Id.* at 1037 (Heaney, J., dissenting).

¹¹⁷ Cantor, *supra* note 39, at 168.

¹¹⁸ Cantor, *supra* note 39, at 168.

¹¹⁹ *Staley v. State*, 2013 WL 4820128, at *1 (2013).

¹²⁰ *Id.* at *1.

¹²¹ *Id.* at *8.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Diane Jennings, *State's Top Criminal Court Says Trial Courts Can't Force Death Row Inmates to Take Medication*, (Sept. 12, 2013), <http://www.dallasnews.com/news/state/>

around the longstanding question of whether it was constitutional to restore an inmate's competency for the purpose of execution. For Staley, the court's decision means he will spend the rest of his life in limbo: he will remain on death row but will not be executed unless he becomes competent on his own without forcible medication. For the rest of the United States, the court's decision simply means that our country remains puzzled about what to do with a population of criminals that are severely mentally ill and on death row.

VII. BEYOND *STALEY*: IMPRESSIONS

A current look into statutes, case law, and psychiatric information regarding the involuntary medication of a death row inmate leaves a reader with almost no firm conclusions. There are conflicting issues and opinions regarding the involuntary medication of a death row inmate. In fact, there are many conflicting issues and opinions regarding the death penalty itself, and these conflicting viewpoints are evidence that our society is extremely uncomfortable with the death penalty. At a minimum, it is likely that Americans would be uncomfortable with the involuntary medication of a death row inmate for the purpose of execution. As Steven Staley's attorney put it: "It's time for us to recognize that it's not civilized to forcibly medicate someone to execute them. That doesn't make any sense."¹²⁵

1. *Artificial Competence*

A severely mentally ill death row inmate who must be medicated to be considered competent is an insane man. Without medication, his insanity makes it unconstitutional to execute him. However, with medication—often administered against his will—the death row inmate is suddenly competent to be executed. This medication calms the inmate enough to prevent frightening hallucinations or delusions of paralysis, to prevent fights with the guards, and to prevent urinating on himself or eating his own flesh. In fact, if powerful enough, these drugs may even mask the death row inmate's symptoms enough so that he looks "sane" and maybe even seems "normal." But under it all, that death row inmate is still an insane man. If taken off his drugs, he would still have those same frightening hallucinations and delusions, and these powerful antipsychotic drugs are merely a temporary solution for an underlying insanity.

As the Louisiana Supreme Court stated in *Perry*, even when antipsychotic drugs are administered as part of an appropriate medical treatment regime, the drugs "merely calm and mask the psychotic

20130911-states-top-criminal-court-says-trial-courts-cant-force-death-row-inmates-to-take-medication.ece.

¹²⁵ *Id.*

symptoms which usually return to debilitate the patient when medication is discontinued.”¹²⁶ Justice Heaney also discussed this idea of “artificial competence” when he concluded that a drug-induced sanity is not the same as true sanity, and that the prohibition on executing the insane should apply with the same force to a medically-treated insane prisoner whose “insanity is merely muted . . . by the powerful drugs he is forced to take.”¹²⁷ Executing a man who is only “competent” because he is being forcibly administered medication is the same as executing an insane man. And the United States Supreme Court has ruled that executing an insane man is unconstitutional.¹²⁸

2. *Liberty Interests*

A mentally ill death row inmate who is forcibly medicated suffers from substantial interference with his own liberty rights. As the Supreme Court discussed in *Harper*, the forcible injection of antipsychotic medication into a non-consenting inmate “represents a substantial interference with that person’s liberty.”¹²⁹ While these antipsychotic drugs often have medical benefits, they alter the chemical balance in a patient’s brain and can often cause serious and even fatal side effects.¹³⁰ For this reason, courts have ruled that the involuntary administration of these drugs in a prison inmate can only occur when the inmate is dangerous to himself or others, and it is in the inmate’s best medical interest.¹³¹ However, for a death row inmate, administering drugs to carry out an execution is never going to be in his best “medical interest” because it means killing him. Thus, there is no overriding justification for the forcible medication of a death row inmate, and the involuntary medication results in a violation of his liberty rights. The Louisiana Supreme Court eloquently discussed its decision to not forcibly medicate death row inmate Michael Perry because it would violate Perry’s own liberty rights and interests:

Unlike other death row prisoners, Perry will be forced to yield to the state the control of his mind, thoughts and bodily functions, ingest or absorb powerful toxic chemicals, and risk or suffer harmful, possibly fatal, drug side effects. He will not be afforded a humane exit but will suffer unique indignities and degradation. In fact, he will be forced to linger for a protracted period, stripped of the vestiges of humanity and dignity usually reserved to death row inmates,

¹²⁶ *Perry*, 610 So.2d at 759.

¹²⁷ *Singleton*, 319 F.3d at 1034.

¹²⁸ *Ford*, 477 U.S. at 399.

¹²⁹ *Harper*, 494 U.S. at 229.

¹³⁰ *Id.*

¹³¹ *Id.* at 226.

with the growing awareness that the state is converting his mind and body into a vehicle for his execution. In short, Perry will be treated as a thing, rather than a human being, and deliberately subjected to “something inhuman, barbarous” and analogous to torture.¹³²

Although he is a prisoner, a death row inmate is still a human being and has certain liberty rights and interests protected by the Constitution. Forcing medication on a death row inmate arguably violates those liberty rights.

3. *Physician Ethics*

A mentally ill death row inmate who is forcibly medicated for purposes of execution creates a difficult dilemma for the treating physician. On the one hand, a physician has a duty to treat her patient’s illness and render that patient the best care possible. The physician must offer similar treatment to patients with similar medical conditions regardless of differentiating factors like race and gender.¹³³ On the other hand, the ethical standards of the American Psychiatric Association (“APA”) and the American Medical Association (“AMA”) prohibit doctors—“member[s] of a profession dedicated to preserving life”¹³⁴—from assisting in the execution of a prisoner.¹³⁵ Thus, treatment to restore an inmate’s competence to be executed is a confusing situation that falls somewhere between these two viewpoints. As the AMA’s Committee on Ethical and Judicial Affairs explained, “responding to the state’s request to provide treatment so that the prisoner’s competence can be reevaluated to determine if the sentence can be carried out raises the specter of so close an involvement as to transgress the boundary of direct participation in the execution itself.”¹³⁶

By asking physicians to participate in medicating an inmate to reach competence for the ultimate purpose of executing that inmate, we are asking physicians to go beyond their duty of care and to venture into an unethical area of practice. This request directly contradicts the position the Supreme Court has taken in stating that the integrity of the medical profession is an interest of great importance that the courts should strive to protect.¹³⁷ The AMA and the APA have further stated that the ethical dilemma of treating a mentally ill inmate for purposes of execution could be

¹³² *Perry*, 610 So.2d at 766.

¹³³ Cantor, *supra* note 39, at 149.

¹³⁴ AMERICAN MEDICAL ASSOCIATION, *Physician Participation in Capital Punishment*, Counsel on Ethical and Judicial Affairs, Report A—1-92, (June 1995) <http://www.ama-assn.org/resources/doc/code-medical-ethics/206c.pdf>.

¹³⁵ *Id.* See also AMERICAN PSYCHIATRIC ASSOCIATION OFFICIAL ACTIONS, *Position Statement on Mentally Ill Prisoners on Death Row* (Dec. 2005).

¹³⁶ AMERICAN MEDICAL ASSOCIATION, *supra* note 134.

¹³⁷ *Singleton v. Norris*, 319 F.3d 1018, 1037 (dissenting, Heaney).

avoided if states were to adopt a different approach.¹³⁸ The AMA and APA recommend reducing the death row inmate's sentence to life in prison without the possibility of parole.¹³⁹ In so doing, a physician would be free to treat an inmate without the fear that she was participating in the inmate's ultimate execution (by restoring the inmate's competence). Maryland is one state that has taken this recommended approach by enacting a statute stating that once an inmate is declared incompetent, a death sentence is automatically reduced to life.¹⁴⁰ Perhaps by listening more to the medical profession, our courts and our legislatures could reach decisions—similar to the State of Maryland—that do not place physicians in situations where they are asked to act unethically.

This past year, the state of Texas withdrew Steven Staley's execution date and forced medication order, and declared him incompetent to be executed because of his mental illness.¹⁴¹ This decision was a step in the right direction for the estimated twenty percent of prisoners suffering from severe mental illness.¹⁴² However, our society still has much work to do. Similar to Charles Singleton and Scott Panetti, other death row inmates like John Ferguson (Florida), Edwin Turner (Mississippi), and Troy Davis (Georgia) have been executed when evidence clearly indicated that they suffered from severe mental illness.¹⁴³

Mental illness has no constitutional protection against the death penalty like insanity and intellectual disability do. When enacting a constitutional ban on executing the insane, the Supreme Court stated that the Eighth Amendment's ban on "cruel and unusual punishment" recognizes the "evolving standards of decency that mark the progress of a maturing society."¹⁴⁴ Considerations of humanity and decency are constantly evolving as our society matures and progresses. As the Supreme Court recognized a ban on executing the insane, it needs to recognize a ban on executing the mentally ill. States that impose the death penalty also need to adopt individual state laws like Maryland that reduce a death sentence to life in prison without parole if an inmate is rendered incompetent to be executed while on death row. This would also help the often tense relationship between the law and the medical profession by allowing doctors to treat mentally ill inmates without fear of facilitating their execution.

¹³⁸ AMERICAN MEDICAL ASSOCIATION, *supra* note 134.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Staley*, 2013 WL 4820128, at *1.

¹⁴² Fox Butterfield, *Study Finds Hundred of Thousands of Inmates Mentally Ill*, N.Y. TIMES (Oct. 22, 2003), <http://www.nytimes.com/2003/10/22/national/22MENT.html>.

¹⁴³ THE DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org> (last visited Dec. 10, 2013).

¹⁴⁴ *Ford*, 477 U.S. at 406.

States need to ban the involuntary administration of drugs to a death row inmate for the purpose of rendering him competent to be executed. With an estimated twenty percent of the prison population suffering from mental illness, mentally ill prisoners are desperate for help and treatment, but not at the expense of their own life and liberty. Instead of involuntarily medicating prisoners for the purpose of enabling an execution, our society needs to address the larger issue of treating the mentally ill. Execution is never going to be a viable solution to the issue of mental illness, and when it is offered as an option for our society, it only stands in the way of overall treatment.